

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

Baxley

Mailed: April 5, 2010

Opposition No. **91194239**

Gaspari Nutrition, Inc.

v.

Athletic Edge Nutrition Inc

Opposition No. **91194344**

Universal Protein Supplements
Corporation d/b/a Universal
Nutrition

v.

Athletic Edge Nutrition Inc

(as consolidated)

Andrew P. Baxley, Interlocutory Attorney:

Athletic Edge Nutrition Inc ("applicant") seeks to register the term INTRA-WORKOUT in standard character form for "dietary and nutritional supplements; dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; dietary supplemental drinks; dietary supplements" in International Class 5.¹ On March 2,

¹ Applicant Serial No. 77832598, filed on September 22, 2009, based on an assertion of use in commerce under Trademark Act Section 1(a), 15 U.S.C. Section 1051(a), and alleging October 10, 2007 as the date of first use anywhere and date of first use in commerce.

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2010, applicant's involved application was published for opposition.

On March 22, 2010, Gaspari Nutrition, Inc. ("Gaspari") filed a notice of opposition on grounds that: (1) the term INTRA-WORKOUT is generic for the identified goods; and (2) the term INTRA-WORKOUT is merely descriptive and has not acquired distinctiveness.

On March 31, 2010, Universal Protein Supplements Corporation d/b/a Universal Nutrition ("Universal") filed a motion to intervene or, in the alternative, to be joined as a party plaintiff, in Opposition No. 91194239. Universal included as an exhibit thereto a separate notice of opposition on the same grounds that are set forth in Gaspari's notice of opposition. The filing of Universal's motion to intervene and notice of opposition resulted in the institution of Opposition No. 91194344. Although time to respond to Universal's motion has not lapsed, the Board, in its discretion, elects to decide that motion at this time. See Trademark Rule 2.127(a).

Universal seeks to intervene in Opposition No. 91194239 based on the common issues of law and fact that are presented in its and Gaspari's notices of opposition. While Fed. R. Civ. P. 24 permits parties to intervene under certain circumstances, intervention is generally

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inappropriate in Board proceedings.² Cf. *Lukens, Inc. v. Vesper Corporation*, 1 USPQ2d 1299 (TTAB 1986). An opposition or cancellation proceeding is based on a specific person or persons' belief of damage from the registration of a mark on the Principal Register and must be filed within certain time restrictions, along with the requisite fee. See Trademark Act Sections 13(a) and 14(a), 15 U.S.C. Sections 1063(a) and 1064(a); Trademark Rules 2.101(b) and 2.111(b); TBMP Section 303.01 (2d ed. rev. 2004). As such, each person or group of persons who believes that they will be damaged by the issuance or maintenance of a trademark registration should, either individually or as joint plaintiffs, commence in a timely manner a opposition or cancellation proceeding by filing their own notice of opposition or petition to cancel and submitting appropriate filing fees. Instead of allowing a prospective plaintiff to intervene in an existing Board proceeding, the Board may, in its discretion, consolidate separate proceedings which involve common questions of law or fact. See Fed. R. Civ. P. 42(a); *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20

² The Board decisions upon which Universal relies in support of its motion are not precedential and are therefore not binding upon the Board. *Citation of Opinions to the Trademark Trial and Appeal Board*, Official Gazette, January 23, 2007, online at www.uspto.gov/web/offices/com/sol/og/2007/week04/patcita.htm. While applicant may rely upon non-precedential decisions for whatever persuasive value they might have, the Board cannot err by failing to follow a non-precedential decision, except under circumstances not at issue here. See *id.*; TBMP Section 101.03 (2d ed. rev. 2004).

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USPQ2d 1154 (TTAB 1991); *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382 (TTAB 1991); TBMP Section 511. The Board may consolidate proceedings that involve different plaintiffs. See, e.g., *Stuart Spencer Designs Ltd. v. Fender Musical Instruments Corp.*, ___ USPQ2d ___ (TTAB, Opposition No. 91161403, March 25, 2009) (seventeen opposers in seventeen consolidated proceedings).

Universal timely filed a notice of opposition, as an exhibit to its motion to intervene, which resulted in the commencement of Opposition No. 91194344. In view of such timely filing, Universal can oppose applicant's involved application in that case. Thus, the Board, in exercising its inherent authority to control the conduct of cases on its docket, finds that Universal's intervention in Opposition No. 91194239 is unwarranted.³ In view thereof, Universal's motion to intervene is denied.

To the extent that Universal requests that it be joined as a plaintiff in Opposition No. 91194239, the Board in *inter partes* proceedings typically only joins as plaintiffs assignees of pleaded marks and/or registrations or other parties who become successors-in-interest of original plaintiffs during the pendency of *inter partes* proceedings.

³ Moreover, intervention by Universal in Opposition No. 91194239 would cause two complaints to operative in that proceeding at the same time. See Fed. R. Civ. P. 24(c). There is generally only

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See Patent and Trademark Rule 3.73(b); TBMP Section 512.01. Because Universal has not alleged that it became a successor-in-interest of Gaspari following the commencement of Opposition No. 91194239, Universal's motion in the alternative to be joined as a party plaintiff in Opposition No. 91194239 is also denied.

Notwithstanding the Board's denial of Universal's motion, a review of the notices of opposition indicates that the above-captioned proceedings involve common questions of law or fact. Accordingly, the Board, in its discretion, *sua sponte* orders the consolidation of those proceedings. See Fed. R. Civ. P. 42(a); TBMP Section 511. The consolidated cases may be presented on the same record and briefs. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989) and *Hilson Research Inc. v. Society for Human Resource Management*, 26 USPQ2d 1423 (TTAB 1993).

Because the above-captioned consolidated proceedings involve different opposers, opposers must appoint one lead counsel to supervise and coordinate the conduct of these cases. See TBMP Sections 117.02 and 511. Opposers are allowed until **May 3, 2010** to file a submission in which they name a lead counsel.

The Board file will be maintained in Opposition No. 91194239 as the "parent" case. As a general rule, from this

one operative complaint at a time in a single Board proceeding.

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point onward, only a single copy of any submission should be filed herein. That copy, however, should include all of the consolidated proceeding numbers in the caption thereof.

However, because the above-captioned proceedings were consolidated prior to joinder of the issues therein, applicant should file a separate answer in each opposition before commencing the practice of filing a single copy of any paper in the parent case.

Despite being consolidated, each proceeding retains its separate character. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleading; a copy of the decision shall be placed in each proceeding file.

Notwithstanding the reference to Opposition No. 91194239 in the caption of the notice of opposition that Universal included as an exhibit to its motion to intervene, the Board will treat that notice of opposition as the operative complaint in Opposition No. 91194344.

Dates herein are reset as follows.

Answers Due	5/3/10
Deadline for Discovery Conference	6/2/10
Discovery Opens	6/2/10
Initial Disclosures Due	7/2/10
Expert Disclosures Due	10/30/10
Discovery Closes	11/29/10
Plaintiff's Pretrial Disclosures	1/13/11
Plaintiff's 30-day Trial Period Ends	2/27/11
Defendant's Pretrial Disclosures	3/14/11

Cf. TBMP Section 507.02.

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Defendant's 30-day Trial Period Ends	4/28/11
Plaintiff's Rebuttal Disclosures	5/13/11
Plaintiff's 15-day Rebuttal Period Ends	6/12/11

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.